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2 IN THE UNITED STATES DISTRICT COURT FOR THE
3 WESTERN DISTRICT OF MISSOURI
4 SOUTHERN DIVISION

5 UNITED STATES OF AMERICA,) Case No. 15-03059-01-CR-S-DGK
6)
7 Plaintiff,) Springfield, Missouri
8) May 20, 2015
9 v.)
10)
11 JOSEPH EDWARD KYLE,)
12)
13 Defendant.)
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9 TRANSCRIPT OF HEARING ON WAIVER OF INDICTMENT
10 AND PLEA TO INFORMATION
11 BEFORE THE HONORABLE DAVID P. RUSH
12 UNITED STATES MAGISTRATE JUDGE

11 APPEARANCES:

12 For the Plaintiff: Steven M. Mohlhenrich, Esq.
13 James J. Kelleher, Esq.
14 Assistant United States Attorney
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18 For the Defendant: Burton H. Shostak, Esq.
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33 produced by transcription service.

1 (Court in Session at 2:37 p.m.)

2 THE COURT: Calling in *United States vs. Joseph Edward*
3 *Kyle*. The defendant appears in the courtroom in person along
4 with his attorneys, Mr. Burton Shostak and Ms. Cynthia Northcutt.
5 The United States appears by Assistant United States Attorney,
6 Mr. Steven Mohlhenrich, and Assistant United States Attorney, Mr.
7 Jim Kelleher. This matter is set this afternoon for a Waiver of
8 Indictment, the filing of an Information and then a plea to the
9 Information. Mr. Kyle, have you seen the Information that the
10 Government proposes to file in your case?

11 MR. KYLE: Yes, Your Honor.

12 THE COURT: Do you understand that because the maximum
13 penalty contained in that Information exceeds one year, that you
14 have an absolute right to have that matter presented to a federal
15 grand jury?

16 MR. KYLE: Yes, Your Honor, I do.

17 THE COURT: Now, I'm going to briefly describe for you
18 the federal grand jury process and then ask you a couple of
19 follow-up questions, Mr. Kyle. A grand jury would consist of not
20 more than 23 and not less than 16 persons. And they would listen
21 to the evidence presented by the United States. If not satisfied
22 with the scope of that evidence, they could subpoena evidence
23 themselves. And if, after hearing it all, they found probable
24 cause to believe that these offenses had been committed and you
25 committed them, then they would return an indictment and that

1 would be the charge against you. If they did not so find this
2 charge could not be brought against you. The only way that the
3 Government can file this Information without going through the
4 grand jury process is with your informed knowledge and consent.
5 Now, I have before me a Waiver of Indictment that you've signed
6 and both of your attorneys have also signed. Do you understand
7 that you have a right to have this matter presented to the
8 federal grand jury?

9 MR. KYLE: Yes, Your Honor, I do.

10 THE COURT: And is it your desire to give up that right,
11 understanding that that will allow the United States to file this
12 Information?

13 MR. KYLE: Yes, Your Honor.

14 THE COURT: I am going to approve the Waiver of
15 Indictment and find that it was made knowingly and voluntarily.
16 Mr. Kyle, you have also signed a consent to have these
17 proceedings for a plea of guilty before a Magistrate Judge, with
18 the understanding that a United States District Judge, a judge of
19 higher jurisdiction, will keep your case for acceptance of the
20 plea of guilty and sentencing. Even though you signed this
21 consent, you have a right, if you wish, to appear before a United
22 States District Judge, a judge of higher jurisdiction, for these
23 proceedings. At any appearance before the District Judge you're
24 presumed innocent until such time, if ever, as the Government
25 establishes your guilt beyond a reasonable doubt to the

1 satisfaction of the judge or jury. You always have a right to
2 confront and cross-examine witnesses. You have a right to use
3 the power of the court to subpoena evidence on your behalf and
4 you have a right to testify or not testify as you would choose.
5 And if you chose not to testify, it would not be held against you
6 as that is your right. If, after understanding the charges
7 against you, the range of punishment, if convicted, and your
8 right to appear before a District Judge, if you wish, you may
9 waive that right and proceed this afternoon before the Magistrate
10 Judge. As I indicated, you have signed such a consent. Do you
11 understand that you have a right to appear before a United States
12 District Judge, a judge of higher jurisdiction, for these
13 proceedings?

14 MR. KYLE: Yes, Your Honor, I do.

15 THE COURT: And is it your desire to proceed this
16 afternoon before the Magistrate Judge?

17 MR. KYLE: Yes, sir.

18 THE COURT: Now, Mr. Kyle, do you understand the charge
19 against you in Count One of the Information that's been filed in
20 this case?

21 MR. KYLE: Yes, sir, I do.

22 THE COURT: And do you understand that if convicted of
23 the charge in Count One that the maximum penalty the court may
24 impose is not more than ten years imprisonment, not more than a
25 \$250,000 fine, not more than a three-year term of supervised

1 release, an order of restitution and a \$100 mandatory special
2 assessment?

3 MR. KYLE: Yes, Your Honor.

4 THE COURT: And to the charge in Count One of the
5 Information, how do you wish to plead, guilty or not guilty?

6 MR. KYLE: Guilty, Your Honor.

7 THE COURT: Do you understand, Mr. Kyle, the charge
8 against you in Count Two of the Information that's been filed in
9 this case?

10 MR. KYLE: Yes, Your Honor.

11 THE COURT: And do you understand that if convicted of
12 the charge in Count Two that the maximum penalty the court may
13 impose is not more than 20 years imprisonment, a fine of not more
14 than \$500,000 or twice the value of the property involved,
15 whichever is greater, not more than a three-year term of
16 supervised release, an order of restitution and a \$100 mandatory
17 special assessment?

18 MR. KYLE: I do, Your Honor.

19 THE COURT: And to the charge in Count Two, how do you
20 wish to plead, guilty or not guilty?

21 MR. KYLE: Guilty, sir.

22 THE COURT: Do you understand Forfeiture Allegation
23 Number 1 that is set forth in the Information that's been filed
24 in this case?

25 MR. KYLE: Yes, Your Honor.

1 THE COURT: And do you understand that if you admit
2 those allegations, that your interest listed in the property that
3 is set forth in Forfeiture Allegation Number 1 would be forfeited
4 to the United States?

5 MR. KYLE: Yes, sir.

6 THE COURT: And do you admit those allegations?

7 MR. KYLE: Yes, sir.

8 THE COURT: Do you understand the Forfeiture Allegations
9 set forth in Forfeiture Allegation Number 2 in the Information
10 that's been filed in this case?

11 MR. KYLE: Yes, Your Honor.

12 THE COURT: And do you understand that if you admit
13 those allegations that your interest in the property listed in
14 Forfeiture Allegation Number 2 would be forfeited to the United
15 States?

16 MR. KYLE: Yes, sir.

17 THE COURT: And do you admit those allegations?

18 MR. KYLE: Yes, sir, I do.

19 THE COURT: Would you please raise your right hand?

20 JOSEPH EDWARD KYLE, DEFENDANT, SWORN

21 THE COURT: Mr. Kyle, as anyone made any threat of any
22 kind to force you to plead guilty or give up any of the other
23 rights that we've discussed this afternoon?

24 MR. KYLE: No, Your Honor, they haven't.

25 THE COURT: Now, you have signed a Plea Agreement. Have

1 you read the agreement and gone over it with your attorneys?

2 MR. KYLE: I have, sir.

3 THE COURT: And do you understand what's in it?

4 MR. KYLE: I do, sir.

5 THE COURT: Other than what is contained in the Plea
6 Agreement, has anyone made any promise of any kind to induce you
7 or overcome your will to get you to plead guilty or give up any
8 of the other rights we've discussed?

9 MR. KYLE: No, sir.

10 THE COURT: Now, I mentioned to you that there was a
11 supervised release term of not more than three years as to both
12 Counts One and Two that could be imposed in your case. Do you
13 understand that if that term were imposed and then revoked for
14 any reason that you could be required to serve an additional term
15 of imprisonment of not more than two years, and if that happened,
16 you would receive no credit for any other time you had spent
17 either in custody or on release?

18 MR. KYLE: Yes, sir.

19 THE COURT: And do you understand that the court could
20 impose an additional term of supervised release, which is
21 governed by the maximum of the statute, minus any time you had
22 spent in custody as a result of a violation?

23 MR. KYLE: I do, Your Honor.

24 THE COURT: Do you understand, sir, that from a sentence
25 imposed in your case that there is no parole?

1 MR. KYLE: I understand.

2 THE COURT: Do you understand that there are Sentencing
3 Guidelines to which the court would refer in an advisory capacity
4 when attempting to fashion a reasonable sentence in your case?

5 MR. KYLE: Yes, sir.

6 THE COURT: Now, the Plea Bargain Agreement, Mr. Kyle,
7 provides that this plea is entered under the provisions of Rule
8 11(c)(1)(C) of the Federal Rules of Criminal Procedure, and
9 provides that the court must impose the sentence as follows. And
10 I'm referring specifically to Paragraph 6 of the Plea Bargain
11 Agreement, Paragraph 6(a). And again, it is -- under the
12 provisions of this plea, it provides that the court must impose
13 the sentence as follows. On Count One, the defendant will be
14 sentenced to a term of imprisonment of 12 months and one day. On
15 Count Two, the defendant will be sentenced to a term of
16 imprisonment of 12 months and one day, to run concurrently with
17 the sentence for Count One. The defendant will be sentenced to a
18 three-year term of supervised release, three years on each count
19 to run concurrently. No fine will be imposed and the court will
20 order forfeiture and restitution as set forth in the last
21 subparagraph of the Factual Basis of this Plea Agreement, which
22 is Paragraph 3. Now, Mr. Kyle, if the court accepts this Plea
23 Agreement, then you would be informed that the sentence will be
24 imposed in accordance with the agreement of the parties. If the
25 court rejects the Plea Agreement, it will, on the record and in

1 open court, inform all the parties that the court rejects the
2 Plea Agreement and advise you personally that because the court
3 is rejecting the agreement, that the court is not required to
4 impose the sentence in accordance with the agreement of the
5 parties. At that point, you are given the opportunity to
6 withdraw your plea of guilty. If you do not withdraw your plea
7 of guilty, then the court is free to dispose of the case less
8 favorably towards you than the Plea Bargain contemplates. Mr.
9 Kyle, do you understand that this is the sentencing procedure to
10 which you have agreed in this case?

11 MR. KYLE: Yes, sir, I do.

12 THE COURT: Now, have you reviewed the guideline
13 applications in Paragraph 11 that are referred to in the Plea
14 Bargain Agreement?

15 MR. KYLE: Yes, sir.

16 THE COURT: And understanding the terms of this Plea
17 Agreement with regard to the sentence, is it your desire for the
18 court to accept the pleas of guilty?

19 MR. KYLE: Yes, sir, it is.

20 THE COURT: Now, Mr. Kyle, you understand that you have
21 a right to a trial by jury with all the protections that I
22 explained to you at the beginning of these proceedings. Do you
23 understand your right to a trial by jury?

24 MR. KYLE: I do, Your Honor.

25 THE COURT: And do you understand that if the court

1 accepts your pleas of guilty, that there won't be a trial?

2 MR. KYLE: Yes, sir, I do.

3 THE COURT: Now, I'm going to ask you about the offenses
4 charged in Counts One and Two of the Information and in
5 Forfeiture Allegation 1 and 2, which are set forth in the
6 Information. I would remind you that you are under oath. You
7 must answer truthfully. Any false answers could result in
8 charges of false swearing or perjury. You always have the right
9 to remain silent. And I want to refer you to your Plea Bargain
10 Agreement, specifically on page 2, Paragraph 3, which is entitled
11 in bold, "**Factual Basis for Guilty Plea.**" And that continues
12 through the entirety of pages 3, 4, 5 and onto a portion of page
13 6. Have you read section, that is, Section 3, Factual Basis for
14 Guilty Plea, have you read it and gone over it with your
15 attorneys?

16 MR. KYLE: Yes, sir, I have.

17 THE COURT: And are the statements contained in Section
18 3 true?

19 MR. KYLE: Yes, sir.

20 THE COURT: Mr. Shostak, you've had access to the
21 Government's discovery file in this case, have you not?

22 MR. SHOSTAK: I have, Your Honor.

23 THE COURT: And based upon your review, are you
24 satisfied if put to proof that the United States could make a
25 submissible case as to all the elements of Counts One and Two as

1 to the Forfeiture Allegations 1 and 2 as set forth in Section 3
2 of the Plea Agreement?

3 MR. SHOSTAK: Yes, sir.

4 THE COURT: There is an adequate factual basis for the
5 pleas of guilty to Counts One and Two of the Information and
6 Forfeiture Allegations 1 and 2. I find that the plea is
7 voluntary and did not result from force, threats or promises
8 other than those set forth in the Plea Agreement. Now, Mr. Kyle,
9 you are represented in this case by Mr. Shostak and Ms.
10 Northcutt. Have you had enough time to talk with them about your
11 case?

12 MR. KYLE: Yes, sir, I have.

13 THE COURT: And are you satisfied with the advice that
14 they've given you?

15 MR. KYLE: Yes, sir, I am.

16 THE COURT: Now, the law requires me to ask you if this
17 afternoon you are on any medication prescribed by a physician or
18 any drugs or alcohol of any kind which would affect your ability
19 to understand these proceedings?

20 MR. KYLE: I am not, sir.

21 THE COURT: Now, the Plea Bargain Agreement that you've
22 signed also has what we refer to as an appeal waiver, and it is
23 set forth on page 15, Paragraph 16. And it provides that you
24 acknowledge, understand and agree that by pleading guilty
25 pursuant to the Plea Agreement, that you waive your right to

1 appeal now or collaterally attack later a finding of guilt
2 following the acceptance of the Plea Agreement, except on grounds
3 of ineffective assistance of counsel or prosecutorial misconduct.
4 That you expressly waive your right to appeal your sentence,
5 directly now or collaterally later, on any ground except claims
6 of ineffective assistance of counsel, prosecutorial misconduct or
7 an illegal sentence. An illegal sentence includes a sentence
8 imposed in excess of the statutory maximum, but does not include
9 less serious sentencing errors such as a misapplication of the
10 Sentencing Guidelines, an abuse of discretion or the imposition
11 of an unreasonable sentence. However, if the Government
12 exercised its right to appeal, you would be released from the
13 appeal waiver and could appeal as allowed by law. Do you
14 understand, sir, that by signing this Plea Agreement that you've
15 given up those rights to appeal?

16 MR. KYLE: Yes, Your Honor.

17 THE COURT: Understanding that and the other matters
18 that we've discussed this afternoon is it your desire for the
19 court to accept these pleas of guilty?

20 MR. KYLE: Yes, sir, it is.

21 THE COURT: Mr. Mohlhenrich, on behalf of the United
22 States, do you have any other record under Rule 11 that you think
23 I need to make?

24 MR. MOHLHENRICH: No, Your Honor. Thank you.

25 THE COURT: Mr. Shostak, on behalf of the defendant, do

1 you have any other record under Rule 11 that you think I need to
2 make?

3 MR. SHOSTAK: No, sir.

4 THE COURT: I will recommend the pleas of guilty be
5 accepted and I will order a Presentence Investigation to be
6 conducted by the Probation Office. Now, Mr. Mohlhenrich, it's my
7 understanding that there has been no request by the United States
8 for detention in this matter, is that correct?

9 MR. MOHLHENRICH: That's correct, Your Honor.

10 THE COURT: Mr. Kyle, as you've heard the Government
11 just state, there's been no request for detention in this matter,
12 so I have prepared a bond and an order setting conditions of
13 release for your signature, which you have reviewed with Mr.
14 Schweighardt with the Pretrial Services Office. You've gone over
15 them and signed them. Do you understand the conditions of your
16 release and the penalties should you violate any or fail to
17 appear?

18 MR. KYLE: Yes, Your Honor, I do.

19 THE COURT: And do you agree to abide by them?

20 MR. KYLE: Yes, sir, I do.

21 THE COURT: I will then order you released on these
22 conditions. If there anything further from either side?

23 MR. MOHLHENRICH: No, Your Honor. Thank you.

24 MR. SHOSTAK: No, sir.

25 THE COURT: All right. With that, we'll be in recess.

1 Thank you.

2 (Court Adjourned at 2:51 p.m.)
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9 I certify that the foregoing is a correct transcript
10 from the electronic sound recording of the proceeding in the
11 above-entitled matter.

12 /s/ Lissa C. Whittaker
13 Signature of transcriber

May 26, 2015
Date